

**STORAGE NAME:** h0681.rpp

**DATE:** March 16, 1999

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
REAL PROPERTY AND PROBATE  
ANALYSIS**

**BILL #:** HB 681

**RELATING TO:** Construction Liens and Bonds

**SPONSOR(S):** Representative Merchant

**COMPANION BILL(S):** SB 1206(s)

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 9 NAYS 0
  - (2) REAL PROPERTY AND PROBATE
  - (3)
  - (4)
  - (5)
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**I. SUMMARY:**

Several amendments adopted by the Business Regulation and Consumer Affairs Committee are traveling with the bill. One amendment deletes the provision which provides that the Notice to Owner required under current law may differ as to format as long as it provides the required information and substantially follows a proscribed statutory form. The amendment replaces that change with a provision that states that certain information must be part of the notice, but that adherence to a particular form set forth in the statutes is something the notice may do, rather than must do.

This bill makes several changes to the Construction Lien Law. The purpose of the law is to give those who supply labor, service, or materials in the construction of a home or building a special legal remedy in the event they are not paid. The law also gives the property owner a method to avoid paying twice for improvements, should non-paid subcontractors or material suppliers seek to recover lost money.

Two recent court cases interpreting current law have resulted in decisions which this bill seeks to reverse. The bill: (1) clarifies the time period in which a claim must be brought under the lien law, and (2) clarifies that the Notice to Owner required under current law may differ as to format as long as it provides the required information and "substantially" follows a proscribed statutory form.

The bill has no significant fiscal impact on state or local governments, or private industry.

**See "Comments" section for additional analysis by the Committee on Real Property and Probate.**

**There is concern regarding the proposed change which subjects a building code administrator or building official to disciplinary action if that person fails to obtain a recorded notice of commencement from an applicant for a building permit as well as the proposed change regarding the statute of limitations for filing actions against contractors, notices of nonpayment, and claims of lien. Please see the discussion of Sections 1 and 4 under "Comments."**

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

*General information on construction lien law:*

Part I of chapter 713, F.S., establishes Florida's Construction Lien Law. The purpose of the law is to give those who make the improvements to land a special legal remedy in the event they are not paid for those improvements. An improvement to land can be made by providing labor, services, or materials. The lien law is based on the premise that improvements to real property enhance the value of the property on a permanent basis. The property itself is therefore treated as a possible source of payment to those providing improvements. The lien law also gives the property owner a method to avoid paying twice for improvements.

There are essentially two sides to the construction process: (1) those persons providing the improvements, and (2) the owner of the property who receives the benefits of the improvements. The Construction Lien Law is intended to contain a rational and fair method for balancing the right of both sides.

This method is based on the concept that a person who improves land should be paid. However, this right to payment should not be at the unfair expense of the land owner who, in good faith, pays for improvements without knowledge that some people remained unpaid for their labor, services or materials. To achieve this balance, the lien law places obligations on all parties in the construction process.

Stated simply, the Construction Lien Law requires that the owner protect those persons that the owner knows are on the job. Obviously, the owner knows the contractor is on the job, because the owner has a contract with that person. However, under normal circumstances, the owner may not know who else is on the job. Typical examples of a person on the job without direct contact with owner are subcontractors and material suppliers. The lien law requires these parties to give the owner formal notice that they are on the job.

Once a subcontractor or material supplier has given the owner notice, the owner is required to see to it that that person is paid. If the owner does not protect him, the owner's land may be subjected to the lien law, and the owner may end up paying twice for the improvements.

Thus, the lien law provides protection to all players involved with a construction project. Contractors, subcontractors, sub-subcontractors and material suppliers have protection against nonpayment for their goods or services. And, not least important, owners can get protection from paying more than they agreed to pay for the project.

*See section-by-section portion of analysis for current situation, regarding specific changes.*

B. EFFECT OF PROPOSED CHANGES:

*See section-by-section portion of analysis for effect of proposed changes.*

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 255.05, 713.06, 713.08, 713.135, 718.18, and 713.23, F.S.

E. SECTION-BY-SECTION ANALYSIS:

**Sections 1, 3 and 6.** Amend ss. 255.05, 713.08, and 713.23 F.S., to clarify the method of calculating the beginning of the maximum time frames for the service of lien or claim against the bond company.

Current Situation:

Current law contains several requirements that certain notifications or claims must be filed within a certain time period. Specifically, there is a requirement that a claimant must supply the contractor with any notice of non-payment for his services or supplies "within 90 days after the final furnishing of the labor, services, or materials." There is also a requirement that a subsequent action against the contractor for nonpayment must be instituted "within one year after the performance of the labor or completion of the delivery of the materials or supplies." Finally, current law requires that a claim of lien against the property must be recorded not later than 90 days "after the final furnishing" of the labor, services, or materials.

In 1996, a ruling of the Fifth District Court of Appeal in *Federal Insurance Company v. Excel of Orlando, Inc.*, held that the one-year limitations period for action against a surety bond begins to run when the architect issued his Certificate of Substantial Completion, despite the fact that the subcontractor did subsequent (minor) work.

The Certificate of Substantial Completion is a document that is commonly called for in a commercial contract (there is no statutory requirement for its existence), and is issued by the architect, to the property owner. In this case, the court's decision had the effect of denying the subcontractor the ability to access the bond to recover payment for the unpaid services he had performed.

Effect of Proposed Changes:

The bill clarifies that the time periods for service of a claim of lien against the property, or for service of notice of nonpayment and bringing suit to enforce a bond claim, are calculated according to the statutory requirements (i.e, when labor performance or delivery of materials are complete or final), and should not be determined simply by the issuance of a Certificate of Substantial Completion.

**Section 2.** Amends s. 713.06(2)(c), F.S., to clarify the extent to which the Notice to Owner must adhere to the form set forth in statute.

Current Situation:

Currently, the lien law provides that the Notice to Owner (supplied to the owner of the property by subcontractors and material suppliers, and used to notify the owner that his property may be subject to lien if the owner does not take care they are paid) must be in "substantially" the form set forth in statute.

Effect of Proposed Changes:

The bill provides that a Notice to Owner may differ as to format and include additional information, as long as it provides the required information, and otherwise "substantially" follows the statutory form.

**Section 4.** Amends s. 713.135, F.S., to provide an additional ground for discipline against a building official.

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Currently, the building department/official is required to verify that a certified copy of the recorded Notice of Commencement has been properly filed, but it is not explicitly provided that failure to do so is grounds for discipline against the building official.

Effect of Proposed Changes:

The bill provides that the failure of an issuing authority (the building official) to comply with the statutory requirements to obtain a certified copy of a Notice of Commencement prior to performing inspections on a construction project is grounds for discipline by the Building Code Administrators and Inspectors Board.

**Section 5.** Amends s. 713.18, F.S., to clarify service of a notice to owner, and allowable method of transmission.

Current Situation:

Currently, the manner of serving notices and other instruments required under the Construction Lien Law is established in ch. 713, F.S.

Effect of Proposed Changes:

The bill clarifies that the provisions regarding service of a notice to an owner for furnishing labor, services or materials, also applies to preliminary notices on bonded projects. It also provides that service may be made by overnight or second day mail delivery.

**Section 7.** Provides that the bill shall take effect October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Comments by the Committee on Real Property and Probate:

Section 1.

Current Situation:

An action for recovery against a contractor or surety on a payment bond must be filed within one year after the performance of the labor or completion of delivery of the material or supplies. s. 255.05, F.S. (1998 Supp.) There is controversy surrounding the method of determining the date on which the one year period begins. Several Florida courts have held that the one year statute of limitations for actions against a surety begins when a certificate of substantial completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d. DCA 1983). In 1982, the Fifth District Court of Appeal stated that when an architect certifies a building as substantially completed and the owner accepts the building, "the contractor is deemed to have fully performed and any lawsuit which could be brought against the surety under the bond must be brought within one year, according to statute." Florida Board of Regents v. Fidelity & Deposit Company of Maryland, 416 So.2d 30 (Fla. 5th DCA 1982).

Florida courts also apply the "substantial-trivia" test to determine the date on which the one year period begins. In 1927, the Supreme Court of Florida held that furnishing an article that is trivial in nature is not sufficient to extend the time for filing a notice of lien if a lienor has substantially completed furnishing materials. People's Bank of Jacksonville v. Virginia Bridge & Iron Co., 94 Fla. 474, 113 So. 680 (1927). The contractor in the Viking Builders case urged that the "substantial-trivial" test is impractical in the construction industry. For purposes of calculating the time period in which to file a lien, the contractor argued that the test should be that the last item of labor or material is the same as the last item the owner is entitled to receive under the contract. Viking Builders, Inc. v. Felices 391 So.2d 302, 304 (Fla. 5th DCA 1980). The court in Viking Builders found a certain logic in the contractor's argument but pointed out that the statute sets the date at which the time limitation commences as "the final furnishing of the labor or services of materials," which is an event that is not abrupt and obvious but is a question of fact. Id.

The court in Viking Builders noted that any resolution of the uncertainty surrounding this issue is necessarily a legislative function, however, the court suggested a possible solution. The court stated that much controversy and litigation could be eliminated if the legislature provided for a written recordable notice of completion which conditions the owner's and contractor's rights under the contract and the law to such recordation so that both the owner and contractor obtain certain benefits from asserting the same event. Id. The legislature could also provide that the contractor is not entitled to final payment, or the right to enforce lien rights, until the contractor signs a notice of completion. Id. Additionally, the legislature could provide that the time limitation for filing liens does not begin to run, and the owner is not entitled to final inspection and occupancy under applicable building codes, until the owner

signs the notice of completion. Id. Laborer's and subcontractor's lien rights could also be time limited by reference to the recorded notice of completion executed by both the contractor and owner. Id.

Effect of Proposed Changes:

Section 255.05(2), F.S. (1998 Supp.), is amended to provide that the time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety may not be determined by issuance of a certificate of occupancy or issuance of a certificate of substantial completion. This proposed change nullifies Florida case law which states that the one-year statute of limitations for actions against a surety bond begins when a Certificate of Substantial Completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d. DCA 1983).

Section 2.

Current Situation:

Currently, s. 713.06, F.S., specifies that a Notice to Owner must be in "substantially" the form delineated in the statute. Recently, a Florida court dismissed a lien foreclosure action because the form used by the supplier was not in substantial compliance with the form prescribed by the legislature. Allstar Building Materials, L.T.D. v. Kronauer, 98-1034 (5th DCA 1998). The court stated that the legislature provided a Notice to Owner form which it deems appropriate and that there is no need to 'reinvent the wheel'. Id. The supplier argued that the Notice in question met the requirement because the information provided was substantially the same information provided in the statutory form. Id. The court decided that the supplier's Notice was insufficient because the Notice was directed to the owner and the contractor, the term "IMPORTANT INFORMATION FOR YOUR PROTECTION" was omitted, and many provisions prominently displayed in the statutory form were dramatically reduced in size and reproduced as though they were footnotes. Id.

Effect of Proposed Changes:

The bill clarifies that the Notice to Owner form must be in "substantially" the form set forth in statute but may include additional information. This section of the bill is amended by Amendment #1 as discussed below.

Section 3.

Section 713.08(5), F.S. (1998 Supp.), is amended to specifically state that the time period within which a claim of lien must be recorded is not determined by the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. This change is proposed to clarify the statute in response to the court's decision in Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996).

Please see Section 1 of "Comments" for additional information.

Section 4.

Current Situation:

Prior to beginning improvements on any real property, or recommencing completion of any improvement after default or abandonment, the owner must record a Notice of Commencement in the clerk's office and post a copy at the construction site. s. 713.13(1)(a), F.S., (1998 Supp.). Recording a Notice of Commencement does not constitute a lien, but gives constructive notice that claims of lien may be recorded and may take priority. s.

713.13(5). F.S. (1998 Supp.) The posting of a copy does not constitute a lien on the property, nor actual or constructive notice of any liens. Id.

If a direct contract is more than \$2,500, an applicant for a building permit must file with the authority issuing the permit either a certified copy of the recorded Notice of Commencement or a notarized statement that the Notice of Commencement has been filed for recording. s. 713.135, F.S., (1997). If a certified copy of the Notice of Commencement is not filed, the issuing authority must not perform or approve subsequent inspections until a certified copy is filed. Id.

#### Effect of Proposed Changes:

If a building code administrator or building official does not obtain, prior to performing inspections, a certified copy of a recorded Notice of Commencement from an applicant for a building permit, the official is subject to disciplinary action by the Building Code Administrators and Inspectors Board under s. 468.621, F.S. (1997). The bill also provides that a lienor may file a complaint against the building code administrator or building official for failure to comply with these provisions. This section is further amended by Amendment #3 as discussed below.

A proponent of the bill asserts that a timely recorded Notice of Commencement is critical to ensure that subcontractors and suppliers have access to information necessary to file a Notice to Owner within the statutory time period. Recently compiled data indicates that only 50 percent of construction projects in most Florida counties have a recorded Notice of Commencement. This provision may encourage more building officials to comply with statutory requirements regarding recordation of a Notice of Commencement. However, it should be noted that the proposed change in this section is under discussion and may be further amended.<sup>1</sup>

An opponent of this section notes that there may be some debate regarding the accuracy of the data showing that only 50 percent of the construction projects have a recorded Notice of Commencement. Again, the proposed change in this section is being discussed and may be further amended to address opponents' concerns.<sup>2</sup>

#### Section 5.

No comment.

#### Section 6.

As a result of the court's decision in Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996), s. 718.23, F.S. (1998 Supp.) is amended to provide that the time period within which a notice of nonpayment must be recorded may not be determined by the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion.

The Real Property and Probate Committee offers the following comments regarding amendments adopted by the Business Regulation and Consumer Affairs Committee:

- #1 The bill states that the Notice to Owner form must be in "substantially" the form set forth in statute but may include additional information. The amendment clarifies that the Notice to Owner may be in substantially the same form but must include the information and warning

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<sup>1</sup> Telephone conference with Deborah E. Lawson, NACM Improved Construction Practices Commission (March 12, 1999).

<sup>2</sup> Telephone conference with C.E. "Ed" DePuy, Jr., The Building Officials Association of Florida (March 12, 1999) and telephone conference with Deborah E. Lawson, NACM Improved Construction Practices Commission (March 12, 1999).

contained in the statutory form. The amendment also deletes the statement that "additional information" may be included in the Notice to Owner (See discussion of Amendment #2).

- #3 The bill provides that a building code administrator or building official who fails to obtain a certified copy of the recorded Notice of Commencement is subject to discipline by the Building Code Administrators and Inspectors Board. This amendment adds a cross-reference to chapter 468, F.S., for the disciplinary provisions contained in the bill. It should be noted that these changes are under discussion and may be further amended.<sup>3</sup>
- #4: Under current law, if a direct contract is greater than \$2,500, Notice of Commencement procedures must be followed. This amendment creates an exemption from the Notice of Commencement requirements for direct contracts of less than \$5,000 for repair or replacement of an existing heating or air-conditioning unit. Due to rising costs of replacement or repair of heating and air conditioning systems, these contracts are often above \$2,500. Proponents assert that, since timing is critical when air or heating systems fail, it is appropriate to create a limited exemption for these types of contracts.<sup>4</sup>

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

The Business Regulation and Consumer Affairs Committee adopted four amendments:

- #1 Deletes the provision in the bill which proposes to clarify that the Notice to Owner required under current law may differ in format, as long as it provides the required information and substantially follows a proscribed statutory form. The amendment replaces that change with a provision that states that certain required information must be part of the notice, but that adherence to a particular form set forth in the statutes is something the notice may do, rather than must do.
- #2 Provides that the Notice of Commencement may be combined with the Notice to Contractor required under s. 713.23, F.S., to streamline the process.
- #3 Provides that a building administrator or building inspector who fails to enforce the notice of commencement requirements may be disciplined for such failure.
- #4 Creates an exemption to current Notice of Commencement requirements for replacement of heating and air conditioning systems in an amount less than \$5,000.

**VII. SIGNATURES:**

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

Prepared by:

Staff Director:

Gip Arthur

Rebecca R. Everhart

AS REVISED BY THE COMMITTEE ON REAL PROPERTY AND PROBATE:

Prepared by:

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<sup>3</sup> Telephone conference with C.E. "Ed" DePuy, Jr., The Building Officials Association of Florida (March 12, 1999) and telephone conference with Deborah E. Lawson, NACM Improved Construction Practices Commission (March 12, 1999).

<sup>4</sup> Telephone conference with Deborah E. Lawson, NACM Improved Construction Practices Commission (March 12, 1999).